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No. 97-6203

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

NATHANIEL JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

DAVID S. KRIS
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2119(2), which provides for a longer term of imprisonment if serious bodily injury results from a carjacking, is a sentence-enhancement provision or a separate criminal offense.

2. Whether enactment of the federal carjacking statute exceeded Congress's authority under the Commerce Clause.

3. Whether Congress intended to permit separate conviction and punishment of a defendant, in a single proceeding, under both Section 2119 (as in effect in 1992) and 18 U.S.C. 924(c), where the defendant used or carried a firearm during and in relation to a carjacking.

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OPINIONS BELOW

The first opinion of the court of appeals (Pet. App. B1-B22) is reported at 60 F.3d 547. The court's second opinion (Pet. App. A1) is not reported, but the judgment is noted at 116 F.3d 1487 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1997. The petition for a writ of certiorari was filed on September 25, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of California, petitioner was convicted on one count of carjacking, in violation of 18 U.S.C. 2119 (1992), and one count of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). The court of appeals affirmed petitioner's conviction, but it vacated the sentence originally imposed by the district court. Pet. App. B1-B23. On remand, the district court sentenced petitioner to 300 months' imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. A1.

1. On December 7, 1992, petitioner and two co-defendants, Donovan Oliver and Darryl McMillan, drove petitioner's car to the parking lot of a liquor store. They approached a parked car and ordered its two occupants, Ali Nassar Mutanna and Abdullah Mardaie, to get out. Oliver stuck a pistol into Mutanna's ear, perforating his eardrum, causing it to bleed profusely, and ultimately causing some loss of hearing. Petitioner and McMillan searched Mutanna's and Mardaie's pockets. Oliver then took Mutanna behind the liquor store, ordered him to lie on the ground, and struck him on the head. Oliver told Mutanna he would kill him if he moved. Pet. App. B5-B6, B17.

Oliver and McMillan drove away in petitioner's car, firing a shot as they left. Petitioner forced Mardaie into Mutanna's car and followed his co-defendants. After they had traveled a short distance, petitioner ordered Mardaie out of the car. Petitioner was apprehended shortly thereafter when he crashed Mutanna's car in

an effort to evade the police. The gun used by Oliver was recovered from the back seat of petitioner's car. Pet. App. B5-B6.

A federal jury found petitioner guilty of carjacking, in violation of 18 U.S.C. 2119, and of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Pet. App. B6.[1] At sentencing, the district court concluded that, under 18 U.S.C. 2119(2), the maximum penalty for petitioner's carjacking offense was 25 years' imprisonment, because the offense resulted in "serious bodily injury" to Mutanna. Based on its reading of the applicable provisions of the Sentencing Guidelines and accompanying commentary, the district court imposed the statutory maximum sentence on the carjacking offense and added a five-year consecutive sentence for the violation of Section 924(c), for a total sentence of 30 years' imprisonment. See Pet. App. B20-B22.

2. The court of appeals affirmed petitioner's conviction. Pet. App. B1-B22. Relying on its prior decision in United States v. Martinez, 49 F.3d 1398 (9th Cir. 1995), cert. denied, 116 S. Ct. 749 (1996), the court rejected petitioner's claim that enactment of the federal carjacking statute exceeded Congress's authority under the Commerce Clause. In addressing that claim, the court explained that nothing in United States v. Lopez, 514 U.S. 549 (1995), altered the conclusion reached in Martinez that the carjacking statute is constitutional. Pet. App. B7-B8. The court further

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[1] Petitioner and his codefendants were charged and convicted in part on the theory that they aided and abetted each other in committing all elements of the charged offenses. Pet. App. B6, B9-B10; 18 U.S.C. 2.

held that Martinez foreclosed petitioner's argument that he could not be convicted under both Section 2119 and Section 924(c) "because both statutes punish the same conduct," and it rejected his challenge to the sufficiency of the evidence to support his convictions. Pet. App. B9.

The court of appeals also rejected petitioner's contention that the reference to "serious bodily injury" in 18 U.S.C. 2119(2) defined an element of a separate offense, which the government was required to plead and prove at trial. Pet. App. B11-B17. The court concluded, instead, that Section 2119 outlaws carjacking and then sets out, in three subparagraphs, different maximum sentences based on the harm that results, in a particular case, from the commission of that offense. Id. at B14. Because an indictment need not allege the existence of a sentencing factor, and because petitioner was given a fair opportunity to contest the issue at sentencing, the court further rejected the argument that petitioner had been denied due process because he was not informed through the indictment or at arraignment that he might face the maximum 25-year sentence. Id. at B16-B17.

Although it affirmed petitioner's convictions, the court of appeals vacated the sentence initially imposed by the district court, because it held that that court had erred in computing the maximum combined penalty, under the Sentencing Guidelines and their accompanying commentary, for petitioner's two offenses. Pet. App.

B20-B22.[2] On remand, the district court imposed a 300-month sentence, and the court of appeals affirmed. Pet. App. A1.

ARGUMENT

1. Petitioner argues (Pet. 7-11) that the federal carjacking statute, 18 U.S.C. 2119, defines three separate criminal offenses, rather than a single offense with different maximum sentences depending on the existence of specified facts. The version of Section 2119 under which petitioner was charged and convicted provided as follows:

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall --
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

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[2] The court concluded that under Guidelines § 2K2.4, application note 2, petitioner's combined sentence should have been limited, in the circumstances of this case, to the 25-year maximum specified in 18 U.S.C. 2119(2). Pet. App. B21.

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

18 U.S.C. 2119 (1992).[1] Petitioner contends that he may be sentenced to a maximum term of 15 years under Section 2119(1), rather than 25 years under Section 2119(2), because the government did not charge in the indictment and prove to the jury that his offense resulted in "serious bodily injury."

That argument is without merit. As petitioner acknowledges (Pet. 9), whether a particular fact must be alleged in the indictment and proved at trial depends on whether or not it is an element of the offense charged. E.g., McMillan v. Pennsylvania, 477 U.S. 79, 84-86 (1986). Whether a given factor that is mentioned in the governing statute is an element of the offense, as opposed to an aspect of the offense conduct that must be taken into account at sentencing, depends, in the first instance, on legislative intent. See Staples v. United States, 511 U.S. 600, 604-605 (1994); McMillan, 477 U.S. at 85-88.

As the court of appeals pointed out (Pet. App. B13), in Section 2119 "the crime of carjacking is defined in the first paragraph and the subparagraphs simply set forth different degrees of sentencing." A "natural reading" of the provision therefore indi-

[1] Section 2119 was amended in 1994 to substitute "with the intent to cause death or serious bodily harm" for "possessing a firearm as defined in section 921 of this title." Pub. L. No. 103-322, § 60003(a)(14), 108 Stat. 1970. We note that it is this version of Section 2119, not the 1992 version applicable here, that is excerpted at page 2 of the petition. The statute was amended again in 1996 to specify that the provisions of subsection (b) would apply in cases involving certain sexual assaults. Pub. L. 104-217, § 2, 110 Stat. 3020.

cates that it "does not establish three separate, substantive offenses," but rather "one offense, as defined in the first main paragraph," followed by "three sentencing possibilities." Ibid. Moreover, the statute's subsections are not "structurally separate," but rather form an integrated whole. Id. at B13-B14; United States v. Rivera-Gomez, 67 F.3d 993, 1000 (1st Cir. 1995). Finally, as the court below also observed (Pet. App. B14-B15), Section 2119's legislative history provides "persuasive evidence" of Congress's intent that serious bodily injury (or, under subsection (3), death) resulting from the offense conduct be considered as a sentencing factor, not alleged and proved as an element of the underlying carjacking offense. The other courts of appeals that have considered the matter have reached the same conclusion, and there is no need for further review. See Rivera-Gomez, 67 F.3d at 1000; United States v. Williams, 51 F.3d 1004, 1009 (11th Cir.), cert. denied, 116 S. Ct. 258 (1995).

On October 14, 1997, this Court heard oral argument in Almendarez-Torres v. United States, No. 96-6839. That case presents the question whether 8 U.S.C. 1326(b), which specifies maximum terms of imprisonment for certain deported alien felons who illegally reenter the United States, defines separate criminal offenses or merely specifies enhanced sentences, under certain circumstances, for the unauthorized reentry offense defined in Section 1326(a). Although both this case and Almendarez-Torres involve the difference between offense elements and statutory sentencing factors, neither case challenges the principles of

construction that govern the resolution of that question with regard to any given criminal statute. This Court's application of those principles to resolve a conflict over the provisions at issue in Almendarez-Torres is therefore unlikely to affect the correctness of the lower courts' consistent interpretation of Section 2119. Furthermore, the court below has already explicitly rejected petitioner's contention that its cases interpreting Section 1326 -- which hold that Section 1326(b) defines separate substantive offenses -- should control the outcome of this case. Pet. App. B15-B16. Thus, even if that position were to prevail in Almendarez-Torres, there would be no reason to remand this case to the court of appeals for further consideration. There is accordingly no need to hold this case pending the decision in Almendarez-Torres.

2. Relying on this Court's decision in United States v. Lopez, 514 U.S. 549 (1995), petitioner contends (Pet. 11-14) that Section 2119 exceeds Congress's authority under the Commerce Clause unless it is interpreted to require the government to prove, as an element of the offense, the existence of a "substantial effect on interstate commerce." The Court recently denied review in a case involving a similar contention, and there is no reason for a different result here. See Fraction v. United States, 118 S. Ct. 100 (1997).

In Lopez, this Court invalidated "a criminal statute that by its terms ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."

514 U.S. at 561. Section 2119, by contrast, applies only to the theft of motor vehicles that have been "transported, shipped, or received in interstate or foreign commerce." Such vehicles are, moreover, instrumentalities of interstate commerce, widely used in economic activity. Finally, in enacting the statute, Congress specifically found that carjacking had become a high-growth business, with criminals transporting stolen cars across state lines for resale at home and abroad. See Pet. App. B8; United States v. McHenry, 97 F.3d 125, 127 (6th Cir. 1996), cert. denied, 117 S. Ct. 992 (1997); United States v. Robinson, 62 F.3d 234, 237 (8th Cir. 1995).

Since this Court's decision in Lopez, the courts of appeals have uniformly upheld Section 2119 as a valid exercise of congressional authority under the Commerce Clause. See United States v. Romero, 122 F.3d 1334, 1339 & n.3 (10th Cir. 1997), petition for cert. pending, No. 97-6863 (filed Nov. 18, 1997); United States v. Hicks, 103 F.3d 837, 847-848 (9th Cir. 1996), cert. denied, 117 S. Ct. 1483 (1997); McHenry, 97 F.3d at 126-129; United States v. Randolph, 93 F.3d 656, 660 (9th Cir. 1996); United States v. Coleman, 78 F.3d 154, 157-160 (5th Cir.), cert. denied, 117 S. Ct. 230 (1996); United States v. Hutchinson, 75 F.3d 626, 627 (11th Cir.) (per curiam), cert. denied, 117 S. Ct. 241 (1996); United States v. Bishop, 66 F.3d 569, 575-590 (3d Cir.), cert. denied, 116 S. Ct. 681 (1995); Robinson, 62 F.3d at 235-237. In the absence of any conflict among the courts of appeals, the conclusion that the statute is constitutional does not warrant this Court's review.

3. Petitioner argues further (Pet. i, 14-16) that the Double Jeopardy Clause, or the rule of statutory construction set out in Blockburger v. United States, 284 U.S. 299, 304 (1932), bars the government from punishing petitioner's conduct under both Section 2119 and Section 924(c). That claim is without merit.

"With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." Missouri v. Hunter, 459 U.S. 359, 366 (1983). Similarly, the Blockburger rule, which treats two provisions as proscribing the same offense unless "each requires proof of a fact which the other does not," 284 U.S. at 304, is "a rule of statutory construction" under which such provisions will be "construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent." Hunter, 459 U.S. at 366, quoting Whalen v. United States, 445 U.S. 684, 691-692 (1980) (emphasis added in Hunter). Thus, even if, as petitioner argues (Pet. 16), Sections 924(c) and 2119 "proscribe the 'same' conduct under Blockburger," separate conviction and punishment for each offense is permissible so long as "a legislature specifically authorize[d] cumulative punishment under [the] two statutes." Hunter, 459 U.S. at 368-369.[4]

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[4] We note that petitioner's argument under Blockburger (Pet. 16) relies on the language of Section 2119 before its amendment in 1994. Because that amendment substituted a requirement that the defendant act "with the intent to cause death or serious bodily harm" for the previous requirement that the defendant "possess[] a firearm" (see note 3, supra), the question whether, under Blockburger, the older language proscribed the "same offense" as Section 2119 is of no continuing importance.

It is clear that Congress intended to authorize punishment of petitioner's conduct under both Section 2119 and Section 924(c). By its terms, Section 924(c)(1) punishes the use or carrying of a firearm "during and in relation to any crime of violence." It then goes on to provide explicitly that the term of imprisonment it prescribes "shall" be imposed "in addition to the punishment provided for such crime of violence," and that "[n]otwithstanding any other provision of law, * * * the term of imprisonment imposed under this subsection [shall not] run concurrently with any other term of imprisonment including that imposed for the crime of violence * * * in which the firearm was used or carried." There is no dispute that carjacking falls within the definition of "crime of violence" set out in Section 924(c)(3); and there can be no serious dispute that Congress intended Section 924(c) to impose a cumulative punishment. Compare United States v. Gonzalez, 117 S. Ct. 1032, 1035-1038 (1997) (discussing Section 924(c)'s prohibition of concurrent sentencing). Every court of appeals to consider the issue has reached the same conclusion (see United States v. Bishop, 66 F.3d at 573 (citing cases)), and this Court has previously denied review in several cases involving the same contention. See, e.g., Hudson v. United States, 516 S. Ct. 890 (1995).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

DAVID S. KRIS
Attorney

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first class mail, postage prepaid, on this 18th day of December 1997.

QUIN DENVIR
ASSISTANT FEDERAL DEFENDER
2300 TULARE STREET
SUITE 330
FRESNO, CA 93721

Seth P. Waxman/cs
SETH P. WAXMAN
Solicitor General

December 18, 1997